CORRELATION BETWEEN FACTS CONCERNING CONFESSIONS PROCURED FROM HERTA AND EHRLICH AND THOSE INVOLVED IN THE [illegible], ASHCRAFT, [illegible], [illegible], [illegible] AND [illegible] CASES

	OPERATIVE FACTS	[illegible] v. U.S. (318 U.S. 332 (1943))	ASHCRAFT v. U.S. (318 U.S. 350 (1943))	[illegible] v. U.S. (136 F. (2d) 877 (1943))	U.S. v. HARTZ (136 F. (2d) 832 (1943))	U.S. v. McCARTHY (137 F. (2d) 412 (C.C.A. 2nd, 1943))	HILDEBRAND v. U.S. (138 F. (2d) 226 (App. D.C. 1943))	HERTA'S STATEMENT OF JULY 6, 1942 (EXHIBIT 356)	EHRLICH'S STATEMENT OF JULY 6, 1942 (EXHIBIT 331)
1.	NATURE OF CHARGE AGAINST DEFENDANTS	Second-degree Murder (p. 331)	Conspiracy to Damage T.V.A. Property (p. 351)	Conspiracy to Disclose to Germany Information About Our National Defense and Failure to Register as Agent of Foreign (p. 879)	Treason (p. 663)	Violation of Section 11 of Selective Service Act	Housebreaking and Larceny	Conspiracy to Counsel Evasion, Resistance and Refusal of Service Under Selective Service Act.	Conspiracy to Counsel Evasion, Resistance and Refusal of Service Under Selective Service Act.
2.	OFFICERS WHO MADE ARREST	Agents of Alcohol Tax Unit of Bureau of Internal Revenue (p. 333)	Sheriff of Polk County, Tennessee and His Deputies (p. 353)	Agents of the F.B.I. (p. 880)	Agents of the F.B.I. (pp. 666-67)	Agents of the F.B.I. (p. 420)	Police officers (p. 426)	Agents of the F.B.I. (R. 1587)	Agents of the F.B.I. (R. 1362)
3.	SEQUENCE OF ARREST, PROCUREMENT OF STATEMENT AND ARRAIGNMENT	First Arrest, Then Procurement of Statement; No Evidence That They Were Ever Arraigned (p. 334)	First Arrest, Then Procurement of Statements and Thereafter Arraignment (p. 356).	First Arrest, Then Procurement of Statement; No Evidence That They Ever Were Arraigned (p. 880)	First Arrest, Then Procurement of Statements and Thereafter Arraignment (p. 665).	First Arrest, Then Procurement of Statements and Arraignment Thereafter Presumed (p. 421)	First Arrest, Then Procurement of Statement and Thereafter Arraignment (p. 426)	First Arrest, Then Procurement of Statement and Thereafter Arraignment (R. 1587-90)	First Arrest, Then Procurement of Statement; No Evidence That He Ever Was Arraigned (R. 1362-1380-81)
4.	PERIOD DURING WHICH QUESTIONING TOOK PLACE PRIOR TO SIGNING STATEMENT AND PRIOR TO ARRAIGNMENT	Two days (p. 345).	Six days (p. 353)	Five days (p. 880)	Four to Seven days (pp. 666-67)	Four days (p. 420)	"More than a week" (p. 426)	Eighteen hours (R. 1587, 1590)	One day (R. 1362, 1380-81)
5.	PLACE ARRESTED PERSON WAS QUESTIONED	Cell in Federal Building Chattanooga, Tennessee (p. 334)	County Jail and Y.M.C.A. in Jonesboro, Tennessee (pp. 352-55)	Cell in F.B.I. Field Office in Los Angeles, California (p. 880)	Rooms of Arrested Persons, F.B.I. offices, Chief of Police's Office and Village Jail in Winnetka, Illinois (pp. 666-67)	Federal Building in Brooklyn and Federal House of Detention in New York City (pp. 420-21)	Police Station (p. 426)	Cell in United States Courthouse, New York City (R. 1587)	Cell in Erie County Jail in Buffalo, N.Y. (R. 1380)
6.	NUMBER OF ARRESTING OFFICERS PRESENT DURING QUESTIONING	Six Agents of Alcohol Tax Unit (p. 336)	One to Four Agents of the F.B.I. (pp. 352-55)	"Several" agents of the F.B.I. (p. 880)	Indefinite Number of Agents of the F.B.I. (pp. 666-67)	One Agent of F.B.I. and Government Prosecutor (pp. 420-21)	Police "officers" (p. 426)	Three Agents of the F.B.I. (R. 1590)	Two Agents of the F.B.I. (R. 1381)
7.	NUMBER OF FRIENDS, RELATIVES OR COUNSEL PRESENT DURING QUESTIONING	None (p. 336).	None (pp. 353, 356).	None (p. 880).	[Opinion does not indicate]	[Opinion does not indicate]	[Opinion does not indicate]	None (R. 1587-90)	None (R. 1380-81)
8.	ADVICE GIVEN TO ARRESTED PERSON IN REGARD TO NECESSITY OF MAKING STATEMENT, USE TO BE MADE THEREOF, ETC.	That They Need Not Give a Statement Unless They Desired to; That They Were Not Required to Answer Questions; That Any Statement Given Could Be Used Against Them (p. 336).	[Opinion does not indicate]	[Opinion does not indicate]	None given (p. 669)	[Opinion does not indicate]	[Opinion does not indicate]	That He Need Not Give a Statement Unless He Desired To; That Any Statement Given Would Be Used Against Him; That He Would Be Promised No Immunity or Reconsgration (R. 1575)	That He Need Not Give a Statement Unless He Desired To; That Any Statement Given Would Be Used Against Him (R. 1381)
9.	FORCE, VIOLENCE, COERCION OR THREAT THEREOF EXERTED UPON ARRESTED PERSON DURING QUESTIONING	None (pp. 336-337)	[Opinion does not indicate]	None (p. 880)	[Opinion does not indicate]	[Opinion does not indicate]	None; statement given freely, voluntarily and without compulsion or inducement of any sort (p. 426)	None (R. 1587-90)	None (R. 1381)
10.	GROUNDS OF OBJECTION TO ADMISSIBILITY OF STATEMENT AT TRIAL	That Statements Were Obtained Through Coercion (p. 349).	That Statements Were Involuntarily Obtained (p. 351a)	Corpus Delicti Not Otherwise Shown (p. 880a)	That Statements Were Involuntarily Obtained (p. 669)	Not Objected To (p. 419)	General Objection (p. 426)	General Objection (R. 1576)	General Objection (R. 1382).
11.	INSTRUCTIONS GIVEN BY TRIAL COURT IN REGARD TO ADMISSIBILITY OF STATEMENT AGAINST DEFENDANTS OTHER THAN THE ONE WHO SIGNED STATEMENT	[Opinion does not indicate]	Statements Admitted Only Against the Persons Who Made Them (p. 356)	Only One Defendant On Trial (p. 879)	Jury Instructed That Statements Were To Be Considered Only Against The Defendant Who Made Them (p. 666)	Only One Defendant On Trial (p. 417)	Only One Defendant On Trial (p. 426)	Jury Instructed That Statement Was To Be Considered in the Case Against Hanse Only (R. 1576)	Jury Instructed Statement Was To Be Considered In the Case Against Ehrlich Only (R. 1382)
12.	DISPOSITION BY THE APPELLATE COURT OF QUESTIONS BASED ON [illegible] RAISED STATEMENTS OBTAINED [illegible] PERSON AFTER ARREST BUT BEFORE ARRAIGNMENT	All Convictions Reversed (p. 347)	All Convictions Reversed (p. 357)	Reversed and Remanded For a New Trial (p. 881)	All Convictions Reversed and Remanded For a New Trial (p. 676)	Reversed And Remanded For a New Trial (p. 422)	Reversed and Remanded For New Trials (p. 427)		

FOR IMMEDIATE RELEASE
SUNDAY, OCTOBER 4, 1942

DEPARTMENT OF JUSTICE

Attorney General Francis Biddle today announced a nationwide program to revoke the naturalization of all former leaders and officials of the German-American Bund whose citizenship was obtained by false representations.

Instructions have been sent to United States Attorneys to initiate proceedings at once against naturalized citizens whose Bund activities indicate that their oaths of allegiance to the United States were taken fraudulently or to further the interests of Germany. Those whose naturalization is revoked will become alien enemies. As such, they will be liable to internment for the duration of the war.

In view of the large amount of litigation anticipated from this program, the U. S. Attorneys have been instructed to petition the courts to consolidate the cases in each judicial district insofar as the common issue of the un-American character of the Bund is concerned.

"Evidence assembled by the Department of Justice gives incontestable proof of the un-American, pro-Nazi character of the German-American Bund," Mr. Biddle declared. "In the 18 years that it and its predecessor organizations flourished here under our democratic hospitality, it worked unceasingly in behalf of the German Reich and against the interests of America.

"In the last decade, particularly, the Bund has been an arm of aggressive Nazi world diplomacy--an instrument of the German 'Auslands Organisation' with headquarters at Stuttgart. Its avowed policy has been to resist integration of Germans into the American system; to retain the complete loyalty of its members in Germany; and to establish in the United States a branch of the German Reich.

"The aims and purposes of the Bund are wholly inconsistent with American citizenship. Loyalty to one excludes loyalty to the other. It therefore follows that those Germans who became naturalized American citizens and at the same time turned actively to the affairs of the Bund are guilty of fraud. Their oaths of allegiance were not honestly taken.

"We are moving at once to clean out this source of danger to our national security. The courts will be asked to denaturalize these disloyal Bundists. Deprived of their citizenship, they automatically become alien enemies. As such, I shall order them interned for the duration of the war."

The program is being launched simultaneously in all communities in which the Bund was active up to the time of its formal dissolution last December. Investigations by the Federal Bureau of Investigation of the Department have been under way for many months. FBI records have been compiled as to the Bund activities of hundreds of former members. In addition, numerous Federal Grand Jury investigations and

criminal prosecutions of prominent Bund officials have yielded important evidence both as to the subversive nature of the Bund and as to the activities of many individual members.

The denaturalization law requires the Government to petition the court for the revocation of a given individual's certificate of naturalization. The petition is substantiated by evidence of disloyalty, or other facts tending to show that citizenship was fraudulently procured or that the defendant did not truthfully subscribe to the oath of allegiance. The defendant is then allowed 60 days in which to file an answer to the petition. After hearing, the court renders its decision as to whether the petition is to be granted or denied. The defendant may appeal an unfavorable decision to a higher court. If he fails to contest the petition, as has been the case in the majority of denaturalization proceedings thus far, his citizenship is revoked by default.

Approximately 500 denaturalization cases were completed, are now pending in the courts, or are under active consideration by U. S. Attorneys at the present time. However, many of those who already have been proceeded against are also former members or officials of the Bund. Chief among these are Fritz Kuhn and August Klapprott, former national "Fuehrers". Another national "Fuehrer", Gerhard Wilhelm Kunze, is not subject to denaturalization since he is a native-born citizen. However, he has been sentenced to 15 years imprisonment

for espionage; a charge, it was shown at his trial, directly related to his Bund activities. In addition, some 30 national or local Bund leaders are under indictment or have entered pleas of guilty in the Southern District of New York for conspiring to violate the Selective Service Act or the Alien Registration Act.

The denaturalization program is being handled by Durward E. Balch under the direction of Wendell Berge, Assistant Attorney General in Charge of the Criminal Division.

BACKGROUND

The history of the German-American Bund stems back through a devious ancestry to the organization of a German patriotic society, "Teutonia", in Detroit, Michigan, in 1924. Its founder was Fritz Gissibl, a German alien who was with Hitler in the Munich beer hall "Putsch".

This event coincided with the emergence of Adolf Hitler on the political scene in Germany. Hitler's inspiration was evident in "Teutonia" as well as among other militant Germanic groups which came into being about the same time. Indeed, there were during the middle and late 'twenties, scattered outposts in the United States of the "Nationalsozialistische Deutsche Arbiter Partei" (National Socialist Labor Party, or Nazi). All gave open and vigorous support to the rising Hitler movement.

In 1933, under the zealous leadership of Gissibl and Heinz Spanknoebel, many of these groups were brought together in a strong, national organization known as "The Friends of the New Germany". With Hitler definitely rising to power in Germany, the vision of world-Germandom caught on among German patriots in America. "The Friends of the New Germany" began to explore its political strength and to conceive its destiny as the spearhead of the Nazi revolution in America.

Reasons of expediency ("'Friends of the New Germany' sounds too German and makes people shy and keeps them from joining", one early official explained) dictated a change of name a few years later, and at a convention in Buffalo on March 29, 1936, the German-American Bund came formally into existence. By this time the organization had been firmly established on the pattern of the Nazi party in Germany. Fritz Kuhn was elected the first national "fuehrer", and local "gauleiters" were named for the various regional and local posts throughout the country.

The "leadership principle" one of the major precepts of the Bund, made it clear that, from the individual member to the national leader, all responsibility was "upward", and the national leader had final authority in all matters. Significant in this connection is the pledge set forth on the membership card issued to Bund members, which reads in part as follows:

"As a member of the German-American Bund I RECOGNIZE THE LEADERSHIP PRINCIPLE which has been fundamental in the Bund since it was conceived and in accordance with which it is conducted . . . I shall utter no criticism of the leaders except in their presence . . . . I am fully aware that the movement is not limited to the unit, but the primary loyalty is due to the Bund as such, personified in its national leader . . . In the service of this cause I pledge . . . . to subject all my other personal interests to the requirements of the Bund . . . ."

The leadership principle was further emphasized in the constitution of the Bund, which set forth that the national leader had unquestioned personal authority over every phase of the Bund's affairs, the disposition of its property and funds, the issuance and revocation of orders, and the power of appointment and removal of officers.

Further similarities to the parent Nazi party in Germany are seen in the organizational structure of the Bund. Local groups were known as "Ortsgruppen", each with its local "fuehrer". These were subdivided into "Ordnungs Dienst", the militant, uniformed "storm troopers"; "Jungenschaft", or youth groups; "Frauenschaft", or women's groups; and "Deutsche Konsum

Verband", or economic groups. The latter branch had among its objectives the boycott of local Jewish business firms and the promotion of import and export business with Germany.

The membership of the Bund at its peak during 1938 and 1939 reached, according to some partisan estimates, as high as 20,000. In reality, it probably failed to reach half that number. Kuhn in several of his statements declared that the "storm troop" divisions should equal at least ten percent of the total membership, and there is reason to believe that that proportion may have been reached or even exceeded. Geographically, the Bund membership centered around New York, New Jersey and eastern Pennsylvania, in the East; around Chicago, Detroit, Milwaukee, St. Louis, Cleveland and Cincinnati in the Middlewest, and around Los Angeles, San Francisco, Portland and Seattle on the West Coast. There were scatterings of membership also in Texas, Colorado, Maryland and other parts of the country. Membership was restricted to persons of German origin, free of Jewish or Negro blood, and believers in the leadership principle.

As in the Nazi party in Germany, the pride of the German-American Bund was its disciplined and uniformed band of "storm troopers". This was to be the nucleus of the armed striking force of the movement when "Der Tag"came.

The following were typical exhortations given a band of "storm troopers" by their local leader in Astoria,

L. I. in 1937:

> "You are political storm troopers and must remember your allegiance to Germany. . . . What happened some years ago is now taking place here. In Germany the people finally rose up in resentment. This will happen here. It is inevitable. When that day comes . . . we must be prepared to fight for the right kind of government. . . There will be bloodshed and fighting. We shall have to do our part."

* * * *

> "Everyone knows that some day bullets will fly in America. When that day comes, we must be prepared to fight for National Socialism."

That German National Socialism is the only desirable form of government, that it is superior to democracy, and that it must be established in the United States through the efforts of the German-American Bund was constantly urged upon Bund members by the leaders in their oral and written pro-

nouncements. Two of the most important documents ever issued by the Bund were its 1937 and 1938 Yearbooks. Some of their passages are highly illustrative of what the Bund sought to do.

"We stand here as the heralds of the Third Reich," one excerpt states, "as preachers of the German world viewpoint of National Socialism which is displayed before the eyes of the world as the incomparable German miracle, the miracle of National Socialism . . . "

* * * *

"What does the union of all Germans by Adolf Hitler, carried out in the old country, teach us? It is this union of the Germans, who for centuries were divided into principalities, vassal states and party strifes, that wrested German culture and nature and finally political influence from the abyss into which they threatened to tumble.

"This glorious feat of the Fuehrer naturally found among those of German extraction living abroad the widest and greatest acclaim. In many of these people is noticeable a great longing to follow this example. They wish to bring about a final unification of all people of German extraction no matter of what nation they may be citizens . . ."

Various other pronouncements of the Bund emphasized the ties that bound Germans in America to the reigning ideology of Hitler and the Fatherland. Fritz Kuhn in one of his propaganda pamphlets declared:

> "The German-American Volksbund is inspired with the National Socialist world concept. National Socialism has given the Germans in foreign countries a unified world view, they cannot survive without a spiritual tie with the homeland.
>
> "We desire that the spiritual rebirth of the German people at home shall spiritually be transmitted to the Germans of America through mediums in flaming words and inspiring examples."

Kuhn, in the official Bund newspaper, counsels his followers not to allow their pure Germanism to be sullied by non-Aryan associations.

> "We people of German descent, who live here in America, have. . . the choice of either holding fast to our German folk group, to our kultur and to our cultural ties with the motherland, or, of disappearing without leaving a trace in the far famed 'melting pot'. Shall we go to ruin along with it? Shall we perish in this completely misleading so-called 'civilization' which, with comparative certainty, will lead us to Bolshevism as the end result? . . . We must learn at

last to defend, with all means, with claws and teeth, all that is holy and dear to us."

The war in Europe brought added courage to the Bund leaders and new contempt for the cause of democracy. The Deutscher Weckruf und Beobachter, official Bund newspaper, proclaimed as recently as March 1941:

"The present war is not only a war between England and Germany and Italy, but is rather the great decisive battle of democracy, of plutocracy and of Jewry, against Socialism . . ."

"The democrats and plutocrats of the world, especially the American Jews, know very well that the hour of reckoning is approaching . . ."

"Onward, you National Socialists and Fascists of the world, you who are the purifying thunderstorm on the horizon of the future . . . Destroy the chains of international plutocracy which shackle you! Destroy the dungeon of world democracy in which free nations are tortured like slaves! And lead humanity toward a more beautiful future!"

As prospects of this country's entrance into the war became more apparent, the Bund sought to use its political influence to advance the cause of isolationism. According to Fritz Kuhn:

"We should concern ourselves first of all

with the politics of this country, and you can be convinced that we do Germany the greatest favor thereby . . .

"One thing must be considered quite definitely. We must impel American politics with a pure German feeling . . . we must demand from the candidates . . . that they, above all else, must always use their influence that America, under all circumstances, must keep out of any European war.

"That is the greatest service that we can show Germany."

As the national crisis deepened, Bund officials openly advocated defiance or evasion of certain laws which they felt might prove inimical to their purpose. Among the official Commands sent out from Bund headquarters in 1940 were instructions whereby those required to register under the Alien Registration Act were advised to obscure their Bund affiliations.

An even more flagrant incident concerned instructions as to the liability of Bund members to register under the Selective Service Act. This Command read, in part, as follows:

"We represent the standpoint, however, that an induction into the military service is NOT justified, insofar as it concerns Bund members and

American Germans, for in the Selective Service Law the citizenship rights of Bund members and defenders of Germandom are unconstitutionally severed.

"Every man, if he can, will refuse to do military duty until this law . . . (is) revoked."

Public antipathy for the Bund grew in proportion as war drew near to the United States. Bund officials encountered ever increasing difficulties: offices and meeting halls were denied to them, their camps were closed, their parades and mass meeting were raided, Fritz Kuhn and other leaders ran afoul of the law. The Bund recognized this and attempted by various means to disguise its identity and purpose. August Klapprott, subsequently made national "feuhrer", told the delegates to the Bund convention in Chicago in August, 1941:

"Almost every group has met with difficulties . . . our will toward work and completion of our idea has been suppressed by the War-Party. The groups were so strongly hindered that some of them have had to adopt the most beautiful society names that they could pick . . ."

That was the last convention the Bund ever held. Public indignation over its obvious and arrogant disloyalty mounted steadily, and shortly after Pearl Harbor the national

officers publicly announced its "voluntary" and final dissolution. The German-American Bund, official spearhead of the Nazi fifth column in America, ceased to exist -- at least under that name. But its spirit and functions continue up to the present day behind the innocent mask of cultural societies, singing and athletic clubs. The Bund, in reality, is far from dead.

As a footnote to its history it is appropriate to note the present status of some of those who activated the Bund in its less troublous days:

G. Wilhelm Kunze, the last official Fuehrer, who fled to Mexico and was returned from there to the United States, pleaded guilty to espionage at Hartford, Connecticut, in July, and was sentenced to serve 15 years imprisonment. He is under indictment in the Southern District of New York for conspiracy to violate the Selective Service Act based upon commands issued by the Bund.

Fritz Kuhn, Bund Fuehrer prior to Kunze, was convicted of embezzling Bund funds by the State of New York and is presently serving a term of imprisonment therefor. Suit to revoke his citizenship is pending in the Southern District of New York.

George Froboese, who served as acting Fuehrer after Kunze fled to Mexico, committed suicide on June 16, 1942, while en route to New York City pursuant to a Federal Grand

Jury subpoena.

August Klapprott, last acting Bund Fuehrer, is on trial in the Southern District of New York for conspiracy to violate the Selective Service Act in connection with Bund commands. His naturalization was cancelled in New Jersey in July, 1942.

Gustav Elmer, National Treasurer and Organizational Leader of the Bund, was "denaturalized" in the Southern District of New York on September 11, 1942.

Dr. Otto Willumeit, Chicago leader, pleaded guilty to espionage at Hartford, Connecticut, and in August of this year was sentenced to serve five years imprisonment. Suit to revoke his naturalization has been authorized.

Herman Agne, Philadelphia Bund leader, is under indictment in the Southern District of New York for conspiracy to violate the Alien Registration Act in connection with Bund commands. A decree was entered cancelling his citizenship in June, 1942.

Matthias Kohler and Arno R. Friedrich, New Jersey Bund leaders, were also deprived of their American citizenship in recent suits.

Fritz Gissibl, the original founder; Walter Kappe, Dr. Hubert Schnuch and Joseph Schuster are among the former leaders who have returned to Germany and now hold responsible positions in the Reich.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 53 - October Term, 1943.

(Argued November 15, 1943 , Decided February 29, 1944)

UNITED STATES OF AMERICA,

Appellee,

-against-

WILBUR V. KEEGAN, GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, CARL RICHARD WENDLANDT, OTTO WILLUMEIT and FRITZ STREUER,

Appellants.

Before:

AUGUSTUS N. HAND, CHASE and CLARK,
Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

[983]* This is an appeal by the above-named appellants from a conviction before Honorable Alfred D. Barksdale, temporarily assigned to the Southern District of New York, and a jury. We think the judgment should be affirmed.

[984] There are two indictments involved. The first indictment of July 7, 1942, is in one count, and charged all the above defendants, except Herman Agne and Fritz Streuer, with conspiring between January 1, 1940, and July 7, 1942, among themselves and with George Froboese and Paul Anding (who were not indicted because deceased), to counsel divers persons to evade, resist and refuse service in the land and naval forces of the United States in violation of Section 311, Title 50 of the United States Code, (§11 Selective Training and Service Act of 1940, 54 Stat. 894) and the rules and regulations promulgated thereunder. This section, so far as it affects the case

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* Numbers in brackets indicate printed pages of the opinion certified as part of the record from the Circuit Court of Appeals.

tefore this court, is quoted below.[1]

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[1] §311. Offenses and punishment

"Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions, who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * * "

[985] The second indictment returned August 26, 1942, is likewise in one count and charged the same conspiracy between the dates of January 1, 1940, and August 26, 1942, but added two defendants, Herman Agne and Fritz Streuer. Among the defendants named in each indictment, William Luedtke, Karl A. Bachman and John Grill pleaded guilty prior to trial, and Ferdinand Callsen was acquitted. By consent of counsel, both indictments were consolidated and being substantially identical, except as to the two additional defendants, may be treated as one. At the close of the government's case all the defendants on trial rested without taking the stand and without offering any evidence. The jury rendered a verdict of guilty as to the above twenty-four defendants who were thereafter sentenced by Judge Barksdale to terms of imprisonment of five years each and thereupon appealed.

The appellant Wilbur V. Keegan was represented during the trial by John G. Broderick, but on appeal he filed a brief and was heard in argument pro se. The other appellants were represented both in the District Court and on appeal by assigned counsel.

In May, 1933, after Adolph Hitler came to power in Germany, a group called the Friends of New Germany was organized in the United States. The defendant Luedtke and the appellants Schwinn, Borchers, Christoph, Fentzke,

Fitting, Ottersbach, Weiss and Wendlandt were members of this organization, the name of which, at a national convention held at Buffalo, in 1935, was changed to German-American Bund. The government introduced evidence tending to show that this organization was utilized to carry out the alleged conspiracy and that it operated up to and including the period embraced in the indictments. The constitution of the Bund stated that its leader was "to maintain and to extend the German-American Bund as an offensive and defensive movement of a nationally conscious German-[986]American people who are national-socialistically and constitutionally dedicated to the service of an actually independent, Aryan-governed United States of America." Nazi terminology, symbols, insignia, ceremonies and party structure were employed. The swastika was displayed at all meetings and was characterized as the symbol of the "will of the Aryan world to live." The Nazi salute was used, with its motto of victory. The Nazi national anthem, The Horst Wessel, was sung, and a picture of Hitler was displayed. It referred to itself as "A Militant Organization of Free Americans" and furnished its members with uniforms like those of Nazi storm troopers. Periodic military drills under German military procedure were to be held. The leader of the organization was the Bundesfuehrer, who was first Fritz Kuhn, and later the appellant, Gerhard Wilhelm

Kunze. The authority of the leader was based on the leadership principle of the Nazi party, which vested all power over the organization and its members in the Bundesfuehrer. There was also a deputy Bundesfuehrer who, during the period of the alleged conspiracy, was the deceased Froboese; he assisted the Bundesfuehrer particularly affecting matters of national policy and activity and acted as leader whenever Kunze was unavailable. The appellant Elmer was national treasurer and organizer for the Bund; he supervised financial matters and saw that the various units were supplied with the necessary paraphernalia such as application blanks and other forms of printed matter, and, as organization manager, formed new units. Luedtke, who was named as one of the defendants in the indictments, pleaded guilty and testified for the government, was the national secretary. He held the official papers of the Bund and issued its membership cards. The appellant Keegan acted as counsel for the Bund and shared an office with Kunze at National Headquarters in Yorkville. Kunze, Klapprott, Elmer and Luedtke, with Froboese, who died [987] before the indictment, constituted the executive committee which met at National Headquarters about every two or three months. The Bund covered the United States and was divided into the East, Middle West and West gaus or departments. At the head of each gau was a leader called

the gauleiter, who was charged with responsibility for the operation of local units within the gau. The appellant Klapprott was the gauleiter of the Eastern gau with an office at Yorkville, Froboese of the Middle-West gau with an office at Chicago, and the appellant Schwinn of the Western gau with his office at Los Angeles. Each department was subdivided into local units headed by a unit leader, who was responsible to his gauleiter and the Bundesfuehrer.

After the national convention in 1940 Kunze issued charters to the local units countersigned by Luedtke; he also appointed the local unit leaders, and at the same time obtained undated resignations signed by each of them to facilitate summary removal if it should be desired. All of the appellants except the officers of the executive committee and the counsel Keegan were gauleiters or unit leaders.

It is clear from the foregoing that the Bund was a national organization with local units that were under regulations and commands emanating from central headquarters. Pamphlets, leaflets and an official newspaper were distributed. Conformity of action was promoted by yearly national conventions, which delegates from the local units attended. Within each department there were periodic meetings of local unit leaders, and at the national convention there were reports as to conformity by each department

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with the orders of the central organization. Bund activities were prescribed by national headquarters through the issuance of Bund commands, which were to be treated as secret. These were issued at the direction of the Bundesfuehrer with the advice of the executive committee. Parts [988] had to be read at the regular meeting of each local unit. The Bund newspaper was sent to all local units. Bund membership was restricted to people of Aryan race, free from Negro or Jewish blood. Applicants were required to subscribe to the leadership principle and had to be sponsored by a Bund member and approved by the local leader, the gauleiter, and the national leader. They could not become full fledged members until after a six months probationary period. If they returned to Germany they were given credentials that were recognized by the Third Reich. All of the above-named appellants were intimately connected with the Bund during the pendency of the conspiracy and in control of its activities; Keegan was its counsel, Kunze its Bundesfuehrer, and, with Elmer and Klapprott on the Executive Committee; the treasurer Elmer and Schwinn were gauleiters, and the other nineteen were local unit leaders, making all together the aggregate of twenty-four who have taken this appeal. Keegan, with thirteen of the appellants, attended the National Convention of the Bund held in Chicago in late August and early September, 1940, when Kunze publicly attacked the pending national service bill. He concluded his remarks at the convention by saying:

" * * * * We must learn that it does not suffice to preach the theory of fanatic partidpation in this service and then to act so weakly and with such disunity as these persons have done heretofore who have necessarily failed. We must live our theory, we must be so hard and selfless in the service, so willing to sacrifice and so disciplined as the fighters in the old Homeland must have been in order to exist where their predecessors were toc weak to do so."

It appears that from the inception, in the summer of 1940, of proposals for the registration of manpower for [989] conscription, the Bund took a position opposed to the drafting of an army which they felt eventually would be used against Germany. Through its newspaper the Bund attacked the pending bills in Congress which would put into operation compulsory military training and service. This was apparently the subject of discussion in the Executive Committee during August of 1940, when the members of that group talked over methods of opposing the bills; and while all reference to the Selective Service was omitted from the stenographic record of the national convention already mentioned, held in Chicago from August 31 to September 2, 1940, Kunze repeated "off the record" the sentiments which had been discussed in the Executive Committee meeting, and attacked the acts pending in Congress as designed to suppress the interest of German-Americans in this country, stating that he "would do everything to prevent the passage of the Draft Act." On September 16, 1940, when the Selective Service Bill was passed, Section 8 (i) [50 U.S.C.A. §308 (i)] read:

"It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund."

As a result of Section 308 (i), supra, the Bund newspaper, the Free American, published on September 19, 1940, an article entitled: "No Civil Rights -- No Military Duty!", with a sub-heading "Draft Exempts Bund Members!" Thereafter, a meeting of the Executive Committee took place at which a so-called Bund Command was drafted and approved by the Committee. This Bund Command 37, dated October [990] 1, 1940, was sent out in accordance with the usual custom of the Bund as described above. As translated it read in part as follows:

"4. Military Service: On October 16, of this year, all citizens and non-citizens (male) who are of age, but who have not passed their 36th year, must register with the military authorities. This order must be complied with unhesitatingly.

"We represent the standpoint, however, that AN INDUCTION INTO THE MILITARY SERVICE is NOT justified, in as far as it concerns Bund members and American Germans for in the Selective Service Law the citizenship rights of Bund members and the defenders of Germandom are unconstitutionally severed!

"Supposing the case should arise, EVERYONE who can take it upon himself will therefore REFUSE to do military service until this law and all other laws of the country or of the States, etc., which restrict the citizenship rights of BUND members ARE REPEALED!

"We shall fight this issue of oppression out as a test case." (Emphasis as in original.)

This Command was sent to all the local units throughout the United States and was either read or its contents made known to the members of the respective units by all the appellants herein who were leaders of local units, unless possibly the defendant Schneller.

Very shortly after the issuance of this Command a meeting of many of the leaders of the units took place in New York at which all the national officers, and Keegan, the counsel of the Bund, were present. Keegan spoke, saying that there was a constitutional question involved in the Selective Service Act, that the German-Americans were discriminated against, that it was their right to establish their [991] rights, and that the Bund, as the "fighting organization, must take it upon itself to correct this". Kunze also spoke, telling the group that in the next issue of the newspaper there would appear a headline "No rights, no duties". This indeed did appear in the issue for October 3, 1940, with an inflammatory editorial in the style customarily used by Keegan.

Soon after this article, Kunze, on October 8, 1940, made various trips throughout the country, accompanied by different members of the Executive Committee depending on the area over which he travelled. The visits were apparently concerned with explanations of Bund Command 37, quoted above; for instance, on his trip to Chicago Kunze told the unit there that if "it is thought we are not good enough to

get work as American citizens then we are not good enough for military service either". It is apparent from the record that the opposition to the draft in the manner just described continued throughout the summer of 1941.

After the attack on Pearl Harbor, and specifically on December 13, 1941, many of the members of the Bund met in Brooklyn in a so-called singing society, apparently in conformity with the idea which Kunze had expressed during the summer of 1940, at the national convention and during a meeting of at least one of the local units, to the effect that if the Bund had to go "under cover" it should form "singing societies or walking societies or hiking societies". In the course of the meeting of the singing society the members were urged both by Klapprott and Keegan to "continue on, work together, hold on together, and keep on going."

WILBUR V. KEEGAN, appellant, pro se;

JOHN F. X. FINN, for appellants Kunze, Klapprott, Schwinn, Fentzke, Rapp, Weiss, Wendlandt and Streuer;

THEODORE KIENDL, for appellants Christoph, Fitting and Kunz;

GEORGE S. LEISURE, for appellants Agne, Borchers and Knupfer;

JOAB H. BANTON, for appellants Belchlavek, Ottersbach and Schatz;

GEORGE C. NORTON for appellants Bregler and Berg;

ALBERT C. ROTHWELL for appellants Bachmaier and Schneller;

LEO J. FENNELLY for appellant Elmer;

HAROLD W. HASTINGS for appellant Willumeit.

JAMES S. M. McNALLY, United States Attorney, for appellee; Peter J. Donoghue, Louis Bender, John C. Hilly, Assistant United States Attorneys, George Jaffin, Special Attorney, Department of Justice, counsel.

AUGUSTUS N. HAND, Circuit Judge:

[992] It is argued on behalf of several appellants that Section 11 (50 U.S. Code §311) of the Selective Training and Service Act, under which the indictments were laid, is unconstitutional because of the provisions of Section 8 (1) in which Congress declared as a policy that a vacancy caused in employment by reason of induction of an employee into the service of the United States should not be filled "by any person who is a member of the Communist Party or German-American Bund". It is unnecessary to do more than advert to Section 14 (b) of the same act which says: "if any provision of this Act, or the application thereof to any person or [993] circumstance, is held invalid, the remainder of this Act, and the application of such provision to other persons or circumstances, shall not be affected thereby". We need not say whether Section 8(i), which apparently was only designed to express a Congressional policy and not a legislative mandate, can fairly be interpreted as going further. The separability clause we have quoted is enough to leave the enactment in Section 11 proscribing evasion of service in the land and naval forces, and conspiracies to do this, unaffected by any constitutional questions as the validity of Section 8(i). Electric Bond & Share Co. v. S. E. C., 303 U. S. 419, 434; Champlin Refining Co. v. Commission, 286 U. S. 210, 234; Reitz v. Mealey, 314 U. S. 33, 39. Congress

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plainly had no intent to have the whole act conditioned on the validity of Section 8(i). Indeed, to impute such an intent seems fantastic.

It is further argued that the indictment was insufficient because the only conspiracy which could be charged under the statute would be one to hinder or interfere with the administration of the act "by force or violence". This same objection to a similar indictment was specifically raised in United States v. O'Connell, 126 F. (2d) 807 (C. C. A. 2), cert. den. 316 U. S. 700. There we held that Section 11 embraces conspiracies to violate any of the substantive offenses described in the section, and is not limited to conspiracies to "hinder or interfere in any way by force or violence."

There is a further claim, which we think to be unsubstantial, that the evidence was insufficient to sustain the charge. The proof indicates that the defendants were part of a large organization, one of the purposes of which was to interfere with the administration of the Selective Training and Service Act. The Bund did everything it could to prevent the passage of the Act, and finally, when the law [994] was enacted, advised its members to "refuse to do military service", until any laws of the country or of the state which affected the citizenship rights of members were repealed. All of the appellants, unless possibly Schneller, have already

been shown to have participated in the formulation or the promulgation of Order 37, which definitely advocated resistance. We think even the appellant Schneller was implicated for, in October, 1940, he had written a newspaper article attacking the draft; in December, 1940 he was visited by Kunze at Erie, and thereafter, at least as early as June, 1941, became a unit leader. These relations with the activities of the Bund were sufficient to justify the submission to the jury of his participation in the conspiracy.

It is also contended that Section 11 is in terms applicable only to conspiracies to counsel others to "evade" service and that the present indictments must fail because no artifice was employed in the present case. But the word "evade" includes not only furtive acts of evasion but also, in our opinion, covers any form of refusal or resistance. Indeed the word derivatively means no more than "go away" or "escape from", whatever be the means of accomplishing the purpose.

The appellants claim error because the judge charged the jury that an intention on the part of the defendants to bring a test case to determine the constitutionality of Section 8(i) of the Selective Training and Service Act was immaterial to the guilt or innocence of the defendants. He charged that a "bona fide honest intent to make a test case was no defense", saying that "if there was a conspiracy

amongst these defendants or any of them having as its object the violation of the Selective Service Law, knowingly, the reason for such violation is immaterial to you in your consideration of the question of their guilt or innocence". It is argued that the question of so-called "corrupt intent" could not properly be withdrawn from the jury. The logical [995] alternative to the rule the judge laid down is freedom to conspire to violate any statute whenever it is thought there is doubt about its constitutionality, however erroneous the contention may prove to be. We are referred to various decisions such as People of the State of New York v. Powell, 63 N.Y. 88; People of the State of New York v. Flack, 125 N.Y. 324, and Landen v. United States, 299 Fed. 75, 78, 79, which indicate that for a conspiracy to exist there must be a corrupt motive. We hold that to establish violation of the statute nothing more has to be proved than that the parties "had in contemplation all the elements of the crime they are charged with conspiracy to commit". United States v. Mack, 112 F. (2d) 290, 292 (C.C.A. 2); Hamburg-American Steam Packet Co. v. United States, 250 Fed. 747, 759 (C.C.A. 2); Chadwick v. United States, 141 Fed. 225, 243 (C.C.A. 3).

Counsel also assign error because of the mode of the selection of the jury. The applicable statute appears in Title 28, Section 424 of the United States Code and is

quoted below.[2] The court adopted a practice for the trial which has been frequently employed and under which peremptory challenges were to be exercised under the so-called alternating system. Under this, the defendants were all together allowed two challenges, then the government one, and so on until the defendants had exercised or waived [996] challenges to the number of eight, then the defendants were required to exercise or waive one, and the government one, and then the defendants one and the government one. Thus the government would have the final challenge. No objection was made to this system until the defendants had exercised, or had an opportunity to exercise, nine challenges, and there remained one challenge for them and one for the government. At that point the jury was declared by defendant's counsel to be satisfactory, but they asked leave to defer the exercise of their last challenge in case the government should exer-

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2. "§424. (Judicial Code, section 287). Challenges. When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to six peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to six peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."

cise its final challenge. The court thereupon said: "The defendants were given the privilege of exercising their right to challenge first, and I don't think it would be fair to change that at the end. I think that alternating system should be followed throughout. So I will say now to defendants' counsel that they may exercise the privilege of a peremptory challenge at this time or the court will consider that they have waived it." To this ruling appellants' counsel excepted. The defendants declined to exercise the last challenge they had under the court's ruling. Thereupon the government exercised its last challenge in respect to juror Number 9, who was excused accordingly. The box was then filled by drawing another juror and the jury as thus constituted was sworn, but, before the trial began, defendant's counsel stated to the court, in the absence of the jury, that the juror who had been drawn in place of Number 9 was not satisfactory to them and that they had had no opportunity to challenge her. The court said: "I think the record already shows that." In other words, they maintained that they should have been allowed to exercise their last challenge after the government's challenges had been exhausted.

In Pointer v. United States, 151 U. S. 396, 410, a unanimous court, speaking through Justice Harlan, enunciated the general rule that where, as in the case at bar, "the subject is not controlled by statute, the order in which peremp-

[997] tory challenges shall be exercised is in the discretion of the court." In Lyon v. State, 116 Ohio St. 265, 155 N.E. 800, the Supreme Court of Ohio, relying on Pointer v. United States, supra, sustained the very method of exercising challenges which the trial judge adopted in the case at bar. In Commonwealth v. Piper, 120 Mass. 185, the court said that "the statutes conferring and defining the right of challenge in capital cases contain no provisions as to the order and time in which the rights shall be exercised by the government or by the defendant***. There is no general rule of court upon the subject and all directions as to the time when and the mode in which either party shall challenge, except so far as regulated by the statutes, like other matters affecting the proper conduct and order of the trial, are within the discretion of the court." See also Philbrook v. United States, 117 F. (2d) 632, 635, cert. den. 313 U.S. 577. The appellants were deprived of no right to exercise one of the peremptory challenges given them by statute, but were merely required to exercise their challenge at a particular time. We are clear that the court in adopting the alternating system infringed no legal right of the defendants and that the jury was properly selected.

The most important question before us is whether certain written statements signed by Kunze and Wendlandt were improperly received in evidence, and whether, if so, they

were prejudicial to any of the defendants other than themselves. The trial judge admitted them only as against these defendants and charged the jury that they were binding on no one else.

Kunze was arrested in Texas on July 4, 1942, by a Special Agent and brought to New York by airplane, where he arrived Sunday morning, July 5, at 8:15 A.M. He was then taken to the New York office of the F. B. I., fingerprinted, photographed and locked in a cell, and arraigned on Monday, [998] July 6. At about 11 A.M., on July 5, he was questioned by F. B. I. agent O'Neill after being informed that he did not have to make any statement unless he so desired, and that if he made a statement it might be produced in court against him. He was also advised that "no promises, immunity, or remuneration would be made to him". O'Neill asked him various questions relating to his activities and he answered them; thereafter the answers were reduced to statement form by O'Neill, and certain paragraphs were incorporated which Kunze himself dictated to the stenographer. These paragraphs were pointed out at the trial by O'Neill. The questioning began 11 A.M., Sunday July 5, and ended at 5 A.M. July 6. It was not continuous, and there is no claim that threats or force of any kind were used to procure it, and Kunze so asserted in the signed statement itself. O'Neill testified that Kunze was given an opportunity to read and make corrections in the statement prior to signing it.

We think there can be no doubt that prior to the decisions of the Supreme Court in McNabb v. United States, 318 U.S. 333, and Anderson v. United States, 318 U.S. 350, the admission of the statement would have been allowed, on the ground that it was voluntary. Lisenba v. California, 314 U.S. 219, 239; Wilson v. United States, 162 U.S. 613. Indeed, there seems to have been no evidence and to be no claim that Kunze was threatened or coerced in any way, or that rudeness of manner was resorted to in questioning him. While he at the time had no lawyer, he did not ask for counsel.

It is to be noted that Kunze's statement contains nothing directly bearing on the issue in the case that Kunze was largely instrumental to the drafting and promulgation of Order 37 counseling resistance to the draft. It contains the statement that Kunze traveled about the country without procuring permission of his Local Draft Board, and similarly entered Mexico with a view to prolonging his journey[999] to Germany and becoming a German citizen. It contains statements of dissatisfaction with the war policies of the national administration, particularly that of friendship with Russia, and of his intention to abandon his United States citizenship and to become a German citizen. He also stated in it that if war were between Germany and Russia or between Germany and England his sympathies would be

exclusively with Germany; and in respect to American-Japanese hostilities that his sentiments "would be favorable to Japan to the extent that a nation of one hundred million people needs a certain amount of room in which to live, unless it is to be condemned to a voluntary suicide". It added that: "If the war were confined to American-German hostilities, I should want to see a negotiated peace with the United States, with Germany predominant in Europe and the United States the ruling power in the Americas". He concluded his statement with the following:

> "At the present time I do not consider myself to be a citizen of the United States of America, but rather as a German national.
>
> "It is my honest opinion that Mr. Roosevelt, through his international policies, provoked war with Japan and with the European powers presently aligned against him.
>
> "The foregoing statement, consisting of three typewritten pages, has been read to me and by me, and as evidence of the truth and of its entire contents, I sign my name below and my initials to each page thereof.
>
> "The foregoing statement is the truth to the best of my knowledge and belief."

It is evident that Kunze's statement contained no direct proof of his connection with the conspiracy and did not mention the Bund, or any of the appellants, or their activi- [1000] ties, but only showed that he was an ardent German sympathizer, was dissatisfied with his United States citizenship, proposed to leave the country and become

a German citizen, and would be against most things which are now part of our national policy. It furnished no direct proof against him on the primary issue of counseling resistance to the draft. The showing of sympathy with Germany and Japan and of opposition to our national policies was substantiated by all the proof in the case and particularly by Order 37 and by the Bund newspaper for which Kunze as Bundesfuehrer was clearly responsible.

The defendant Wendlandt was the Buffalo Unit Leader. F.B.I. agent Young first met him on April 9, 1942, at the F.B.I. office in Buffalo late in the evening and questioned him concerning his Bund activities. Wendlandt, not then under arrest, at first denied that he was a member of the Bund, but later admitted that he had been a member and that he had Bund mail delivered to him under the name of Wendel, and had been unit leader. During the interview one Marie Kraus came into the office. Young accompanied her to her home which he entered with her permission. There he found Bund paraphernalia which Wendlandt identified as belonging to him and said that he had given it to Miss Kraus to hide in her attic. It contained photographs of Hitler and Hess and various insignia. At the time of the first interview Young asked Wendlandt to make a signed statement of what he had said, but the latter said he wished to think the matter over. On May 5, 1942, Wendlandt called Young on the telephone and

arranged a meeting for the morning of May 6. On that day a statement was dictated by Young in the presence of Wendlandt, and which the latter read and corrected in some respects and then signed. He was informed by Young that he did not have to make it and that it was possible that it might sometime be used against him in a court of law. He was also advised that he might [1001] have an attorney, but said that he did not wish one and was perfectly willing to sign any statement that was true. Another statement was made by Wendlandt on May 26, 1942. Both the one of May 6 and May 26 were admitted in evidence and he was not under arrest and subjected to no duress in the case of either.

On the afternoon of July 7, 1942, Wendlandt was arrested at his apartment in Buffalo and after being warned of his constitutional rights and of his right to have an attorney was asked to make and sign a statement. At this interview Wendlandt informed Young that he had either read or passed Bund Command 37 around at the meeting but requested that these facts should be omitted from the statement because he was uncertain about which he had done. He also said that he had discussed Command 37 at one of the Bund meetings in Buffalo. It is not shown when he was arraigned.

We cannot see that the statement of July 8 was prejudicial to Wendlandt or to anyone else. It explicitly denied any subversive activities, denied that he was ever

requested by Kunze or any other national leader of the Bund to do anything unlawful, or to give any information concerning national defense industries. He stated that he had not always followed the Bund commands, and that he had written National Headquarters about Order 37 because he did not understand it. Beyond the fact that he was interested in the Bund, was a Unit Leader and was aware of Order 37, we find nothing in the statement of importance. Everything at all material was embodied in his prior statements of May 6 or May 26, which were made when he was not under arrest. The oral statement made by him to Young as to the promulgation of Order 37 at a Unit meeting was merely corroboration of other undisputed evidence that Bund orders were to be promulgated and that Wendlandt had made Order 37 known to the members of his Unit. The inferences of participation in the conspiracy to resist military service as re- [1002] quired by Order 37 seems to us overwhelming. Under any view, the written statement of July 8, 1942, added nothing important to the clearly admissible statement of May 26 and was, therefore, not prejudicial.

The question remains whether the statement of Kunze of July 6, 1942, and that of Wendlandt of July 8, 1942, were technically inadmissible under the decisions of McNabb v. United States, 318 U. S. 332, and Anderson v. United States, 318 U.S. 350. The Supreme Court there held that statements

procured from a defendant while under arrest are inadmissible, whether or not voluntarily made, if the arresting officer does not comply with the Acts of Congress requiring a defendant to be promptly taken before a committing magistrate.[3]

Kunze was arrested in Texas on July 4th, a national holiday. He arrived in New York by plane on Sunday, July 5, and was arraigned on Monday, July 6, 1942, the first business day after his arrest. We are not persuaded that

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3 18 U. S. C. A. §595.

"Persons arrested taken before nearest officer for hearing. It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, * * * "

5 U. S. C. A. §300a.

"Federal Bureau of Investigation; authority of officers to serve warrants and make arrests; * * *

"The Director, Assistant Directors, agents, and inspectors of the Federal Bureau of Investigation of the Department of Justice are empowered to serve warrants and subpoenas issued under the authority of the United States; to make seizures under warrant for violation of the laws of the United States; to make arrests without warrant for felonies which have been committed and which are cognizable under the laws of the United States, in cases where the person making the arrest has reasonable grounds to believe that the person so arrested is guilty of such felony and where there is a likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be immediately taken before a committing officer. * * *."

[1003] the Supreme Court decisions go so far as to preclude the use of every oral or written statement made by a defendant after arrest and before arraignment, if the arraignment is prompt. For instance, we should not suppose that voluntary oral statements made by a defendant while on his way to the place of arraignment would be excluded, nor would we exclude voluntary written statements though made after arrest and prior to arraignment if the arraignment was not unduly delayed. We think that §300a of U. S. C. A., Title 5, requiring the person arrested by F. B. I. officers to "be immediately taken before a committing magistrate", and §595 of U. S. C. A., Title 18, dealing with arresting officers generally, ought to be interpreted alike. United States v. Bell, 48 F. Supp. 986, 994. Neither statute sets up a standard of conduct that is unreasonable or practically impossible. In the case of each statute the arraignment must only be made with all convenient speed in a strict sense. The rule of McNabb v. United States was designed to secure prompt arraignment. With all deference we are not inclined to follow the dictum in United States v. Haupt, 136 F. (2d) 661, 667 (C. C. A. 7), to the effect that all statements procured before the compliance with the statute are inadmissible. In Mitchell v. United States, 133 F. (2d) 426 (C. A. D. C.), where the defendant had been kept under arrest for more than a week without arraignment, the Court of Appeals of

the District of Columbia held that his confession, obtained prior to arraignment, should not be received in evidence because of the ruling in McNabb v. United States. The decision clearly is not a pertinent reference for our purposes. Moreover, on January 17, 1944, the Supreme Court granted a writ of certiorari to review it.

We do not think that Kunze was transported to the forum in which he was to be arraigned and tried or was incarcerated after his arrival in New York in violation of the statutes providing for prompt arraignment. To expect arraignment [1004] on the Fourth of July, or Sunday, would require a promptitude that we do not regard as contemplated by the statutes. The arraignment of Wendlandt is not shown to have violated statutory requirements. But even if we are wrong in our interpretation of the McNabb decision, we think there was no error which would justify a reversal of the judgment. The guilt of Kunze was clearly proved by his undoubted participation in Order 37. His pro-German sympathies and activities and proposed abandonment of American citizenship only were important if his violation of the Selective Training and Service Act was in doubt. The evidence of violation of the Act was all against him. His statement, therefore, had at most but a slight importance, the weight of which was completely dissipated by overwhelming proof of guilt. In the case of Wendlandt, for the reasons already

given, there was no substantial prejudice in the evidence taken while he was under arrest.

In any event, none of the appellants, other than Kunze and Wendlandt, was prejudiced by the admission of their statements. Not only did the statements fail to disclose the names of any of the others but they failed to connect any of them with the conspiracy. The connection was established by other and abundant proof. In this respect the case at bar is distinguishable from Anderson v. United States, 318 U. S. 350.

The charge of the judge that no inference was to be drawn by the jury from the failure of the defendants to take the stand is criticised by counsel for certain appellants, but under the recent decision of Bruno v. United States, 308 U. S. 287, it was necessary because it had in substance been requested by counsel for several of the appellants. The instructions of the court in respect to the reading of newspaper articles were not only entirely unobjectionable but most sensible and useful. The motion to withdraw a juror because of the article in the Daily News of October 15 entitled "Bund [1005] Leaders Toss in Sponge at Draft Trial" was properly denied. There was no showing that any juror read the article and there is no reason to believe, if he or she did, that the testimony and the clear instructions of the court were disregarded. Jurors cannot be treated as unable to withstand any

effect of newspaper publications. Indeed such a ruling would make it practically impossible to conduct trials in metropolitan centers and would treat the average sceptical juror as a helpless person.

We have considered various other objections raised by appellants and find nothing requiring further discussion.

During the whole trial the judge exercised scrupulous care and dealt with complex questions of law and fact with intelligence and fairness. In a situation where passions might run high he maintained the highest traditions of the bench. Counsel assigned to defend the appellants likewise deserve special commendation for rendering arduous services with fidelity and skill. We have never known an appeal to be more ably conducted. They are given the thanks of the court for performing a task that can be compensated in no other way.

Judgment of conviction is affirmed as to all the defendants."